IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.46 OF 1999

Roha Dyechem Private Ltd. .. Appellant
V/s
Deputy Commissioner of
Income-tax, Special Range 24. .. Respondents.

WITH

INCOME TAX APPEAL NO.47 OF 1999

Roha Dyechem Private Ltd. .. Appellant
V/s
Deputy Commissioner of
Income-tax, Special Range 24. .. Respondents

.....

Mr.J.D.Mistri i/by M/s.Rajesh Shah & Co. for the Appellant.

Dr.P.Daniel for the Respondents.
....

CORAM: S.RADHAKRISHNAN &
J.H.BHATIA, JJ.

DATE : 28.06.2005.

P.C.:

1. In Appeal No.46 of 1999 the following substantial questions of law have been raised:-

(A) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining an addition of Rs.98,810/- to the income of the Appellant when there is no provision in the Act which would empower an Assessing Officer to make an addition to the selling price of goods on the ground that a higher price could have been realised?

(B) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining an addition of Rs.98,810/- to the income of the Appellant without considering all the relevant factors and reasons why Appellant had made sales to its dealer at prices lesser than it made sales to end user of its products?

(C) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining

an addition of Rs.98,810/- to the income of the Appellant on the basis set out in its order?

2. Similarly, in Appeal No.47 of 1999 the following substantial questions of law have been raised:-

(A) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining an addition of Rs.3,38,180/- to the income of the Appellant when there is no provision in the Act which would empower an Assessing Officer to make an addition to the selling price of goods on the ground that a higher price could have been realised?

(B) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining an addition of Rs.3,38,180/- to the income of the Appellant without considering all the relevant factors and reasons why Appellant had made sales to its dealer at prices lesser than it made sales to end user of its products?

(C) Whether on the facts and in the circumstances of the case the Tribunal was right in law in sustaining an addition of Rs.3,38,180/- to the income of the Appellant on the basis set out in its order?

3. The basic contention of the Appellants is that the Assessing Officer has no legal authority to add certain amounts by way of income when the said amounts have not been really earned by the Appellant or received by the Appellants. To put it in other woards, the main contention of the Appellants is that neither the sum of Rs,98,810/- nor the sum of Rs.3,38,180/- have been received by the Appellants as an income and as such, the Assessing Officer could not have added the same to the income of the Appellant only on the presumption that the Appellant ought to have received the aforesaid amounts.

4. The brief facts are that the Appellants were supplying certain food colours to various parties. One of them was M/s.Bush Boake Allen (India) Limited which was also a Manufacturer and was utilising the food

colours supplied by the Appellants as a base for manufacturing of its items. There is no dispute that the said M/s.Bush Boake Allen (India) Limited as a manufacturer was also eligible for Modvat credit on the cost of input. The Appellants had also supplied similar food colours to M/s.Associated Textiles which is a partnership firm. It appears that two of the lady partners are sisters of one of the Director of the Assessing Company and they are also the daughters of another Director of the Assessee Company. It appears that the the third partner of M/s.Associated Textiles viz.K.L.Kedia is second degree cousin of Mr.N.J.Tibrewala. The Tribunal has proceeded on the basis that there is a difference in the prices received by the Assessee Company from the sales made to the aforesaid said M/s.Associate Textiles from that of M/s.Bush Boake Allen (India) Ltd. The Tribunal has proceeded on the basis that the Assessee Company has sold the food colours at a slightly lesser rates to M/s.Associate Textile (wherein the partners are the close relatives of the Assessee Company), as compared to that of M/s.Bush Boake Allen (India) Ltd. We have also perused the chart annexed in the Tribunal's judgment and order, wherein, the difference appears to be from 0.8% to 12.54%. If we analyse the actual figures, the entire sale to M/s.Associate Textile and M/s.Bush Boake Allen (India) Limited, the total figure is around 1.5 crores and the alleged difference in price due to slight concession given to M/s.Associate Textile is around 3.38 lakhs. As far as one of the Assessment Year is concerned, the difference is around 3.38 lakhs which

would be around 4.5% of the total amount received. Similarly, with regard to other year, the difference is Rs.98,810/- which would be hardly 1.3%.

5. The learned Counsel for the Appellants has sought to contend that the Respondents have not substantiated any material to indicate that the above amounts which have been added as income have actually been received or earned by the Appellant. To put in other words, merely on a presumption that the Appellant ought to have earned or ought to have received is not a ground to add the said amounts by way of income.

6. Shri.Mistri, the learned Counsel for the appellant also brought to our notice the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Gujrat V/s A.Raman & Co. (1968) 67 ITR 11**, wherein the Supreme Court dealing with the same issue has observed as under:-

"The plea raised by the Income-tax Officer is that income which could have been earned by the assessees was not earned, and a part of that income was earned by the Hindu undivided families. That according to the Income-tax Officer was brought about by "a subterfuge or contrivance". Counsel for the Commissioner contended that if by resorting to a "device or contrivance", income which would normally have been earned by the assessee is divided between the assessee and another person, the Income-tax Officer would be entitled to bring the entire income to tax as if it had been earned by him. But the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands: income which he could have, but has not earned, is not made taxable as income accrued to him. By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee, and if the income has escaped tax in a previous assessment a case for commencing a

proceeding for reassessment under section 147(b) may be made out. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislature injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented."

7. Mr.Mistri, the learned Counsel for the Appellants has contended that the Supreme Court has clearly held in the aforesaid judgment that the law does not oblige a trader to make maximum profit that he can, out of his trading transactions. The learned Counsel for the Appellants has further pointed out that the Supreme Court has indicated that the income must accrue to a trader which is taxable in his hands, and the income which he could have but has not earned is not made taxable as income accrued to him.

8. Dr.Daniel, the learned Counsel appearing for the Respondents brought to our notice that in view of Section 2 Clause 24(iv) of the Income Tax Act, the authorities had a right to add the said income as earned income. We do not understand as to how this provision would be made applicable in the instant case. There is not even any material to show that any benefit had actually accrued, except to contend that certain concession was shown to M/s.Associate Textiles. Dr.Daniel also referred to Section 40A (ii)(a) of the Income Tax Act, the provisions of which are also not applicable in the present case.

9. The Respondents have totally failed to bring on

record any material to indicate that the above amounts which the Income Tax Authorities have added as income have been actually earned by the Assessee Company. The Income Tax Authorities have sought to add the aforesaid amounts as an income of the Assessee Company only on a presumption that the Appellants ought to have charged higher amounts and earned that amounts. It is not even the case that the Appellants having surreptiously paid this amount by M/s.Associated Textiles and the same have not been reflected in the books of Accounts.

10. As indicated in the above judgment, the Hon'ble Supreme Court has made it explicitly clear that the income which accrues to the trader can only be made taxable, and the income which he could have but not earned cannot be made taxable. Under these circumstances, we answer the aforesaid questions in the negative and allow the Appeals in favour of the Appellants/Assessees and against the Revenue.

(S.RADHAKRISHNAN J.)

(J.H.BHATIA J.)